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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 377. (369.)

DRAINAGE COMMISSION OF NEW ORLEANS,
PLAINTIFF IN ERROR,

vs.

MISS LUCRETIA B. WILDER ET ALS., DEFENDANTS IN ERROR.

Brief of Plaintiff in Error on Motion to Dismiss or Affirm.

WILLIAM WIRT HOWE,
For the Drainage Commission of New Orleans, Plaintiff in Error.

OCTOBER 30, 1899.

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IN THE

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vs.

Miss LUCRETIA B. WILDER ET ALS., DEFENDANTS IN ERROR.

Brief of Plaintiff in Error on Motion to Dismiss or Affirm.

The defendants in error have moved to dismiss or affirm.

It does not seem to us that there is any color for the motion to dismiss, nor any reason for motion to affirm.

An inspection of the record will show that the plaintiff in error, The Drainage Commission of New Orleans, specially claimed in its pleadings (Transcript, MS. p. 36) and its assignments of error (MS. p. 143) in the State court its rights, privileges, and immunities:

(*a.*) Under the clause of the Constitution of the United States which forbids a State to pass any law impairing the obligation of contracts.

(*b.*) Under the clause of the fourteenth article of amendment which forbids a State to deprive any person of property without due process of law.

The case involves, and has involved from the beginning, important Federal questions, including the construction of the above-named clauses of the Constitution of the United States and the asserted invalidity of articles 315, 316, and 317 of the Louisiana constitution of 1898, as sought to be enforced in the State court; and these questions have been decided against the Drainage Commission of New Orleans, plaintiff in error. A fund belonging to the plaintiff in error by a consecration which antedates the State constitution of May 12, 1898, and which had been devoted to large contracts for drainage work prior to that constitution, is sought to be invaded and reduced by this State legislation in favor of relators below, in order to pay sundry debts of the city of New Orleans, which as debts of that city did not exist by its assumption until July 26, 1898, a date long after the contracts of the Drainage Commission, based on its consecrated fund, had been made, and its bonds largely sold to pay these contracts.

If our writ of error be not good and worthy of the same discussion accorded to other cases in this court, we are profoundly mistaken in our views of the law of such a subject.

SOME HISTORY OF THE CASE.

By the constitutional amendment proposed in Louisiana, by act 110 of 1890, and duly adopted in 1892, an issue of constitutional bonds of the city of New Orleans, not exceeding $10,000,000, was authorized for certain specific purposes and for no other purpose. These purposes are specified in section 1 of the act. They are—

"For the purpose of retiring the now existing, valid outstanding bonds of the city of New Orleans, including the

bond certificates or bonds issued under the act of the legislature 58, 1882, and to retire judgments hereafter rendered against the city on floating debt claims prior to 1879, entitled to be funded under act 67, of 1884."

The application of these new bonds is described as follows:

"The said bonds shall be applied by the said board to the retirement of the said outstanding bonds and judgments by the sale of said constitutional bonds and application of the proceeds of sale of the Board of Liquidation to pay or purchase said outstanding bonds and judgments, or by exchanging the said constitutional bonds for bonds, on the terms and in the mode prescribed by the legislature."

To provide for the carrying out of this plan it is further declared that—

"For the payment of interest and principal at maturity of constitutional bonds and other outstanding bonds not retired under this amendment, and for the payment of the annual allotments and premiums of the premium bonds of said city, the said city is hereby authorized and directed to levy annually and until the full payment of said bonds, a special tax of one per cent. on all the real and personal property of the city."

The proceeds of said tax to be applied by the Board of Liquidation—

"To the payment of the interest and principal at maturity of said constitutional bonds and outstanding bonds not retired and to the payment of the allotments of premium bonds and premiums extant in the hands of holders."

It is further provided as follows:

"That said tax is hereby declared to be the contract right of the holders of all said bonds, and the exemption of said constitutional bonds from taxation by the city of New Orleans and State of Louisiana is hereby recognized and declared, and after the payment of all the annual interest on

said constitutional bonds and bonds not retired and the payment of said annual allotments of premium bonds and premiums extant in the hands of holders, and after making provisions for a sinking fund, at such time and of such an amount as the legislature prescribes, the surplus of said one per cent. (1%) shall be disposed of *as prescribed by the legislature.*"

It is further declared that—

"The act passed at the present session, No. 36, entitled An act to carry into effect the constitutional amendment, etc., is hereby approved and confirmed in all its parts as a contract between the city of New Orleans and the holders of the aforesaid constitutional bonds, premium bonds, and other bonds outstanding not retired as aforesaid."

This act, called No. 36, which was probably its journal number, is appended to the constitutional amendment at the foot of page 145 of the Acts of 1890.

Section 2 of the constitutional amendment authorizes and empowers the city of New Orleans to examine into and assume the payment of the claims or obligations of the board of school directors for the city and parish of New Orleans due for the years 1880, 1881, 1882, 1883, and 1884. This provision emphasizes the plain distinction between an obligation of the board of school directors and an obligation or debt of the city of New Orleans, a distinction which will be alluded to again; and this section 2 does not at all authorize the use of the constitutional bonds to pay any obligations of the board of school directors, whether assumed by the city or not. On the contrary, the affirmations of this section are pregnant with a denial of the rights to use the bonds in such a way, it being manifest that claims or obligations of the board of school directors are to be assumed and paid in some other way, and, as a matter of fact, this has been done, as shown in this record.

Proceeding now to the act appended to the constitutional amendment, we find in section 1, page 146, another and

equivalent statement and limitation of the use to be made of the constitutional bond as follows:

"That in order to provide for the retirement of the outstanding bond indebtedness of the city of New Orleans and such other indebtedness as under existing laws is or becomes entitled to be funded into any series of bonds, always saving and excepting, however, the bonds, known as premium bonds, the city of New Orleans is authorized and empowered and directed to issue bonds to the amount of $10,000,000; nine thousand of which bonds shall be for one thousand dollars each and two thousand of which shall be for $500 each, to be known as the constitutional funds of the city of New Orleans, dated July 1st, 1892, payable fifty years after date with the right to call by lot not more than $700,000 per annum after the year 1925," etc.

It is manifest from this provision that it does not enlarge the limitations of section 1 of the constitutional amendment itself as to the objects to which the bonds were to be solely devoted. On the contrary, the issue is to be confined to the retirement of outstanding bond indebtedness and other indebtedness fundable in bonds under existing laws—that is to say, to bonds outstanding or indebtedness entitled to be funded in bonds *prior to July, 1890*. Passing on, we find sections 8, 10, and 16 of the appended act, called 36, to be as follows:

"SECTION 8. *Be it further enacted, etc.*, That out of the proceeds of said one per cent. per annum tax, beginning in the year 1892, the said Board of Liquidation shall annually provide for the carrying of the premium bond plan, the payment of interest upon the bonds herein authorized to be issued, and of the interest upon all other outstanding interest-bearing bonds of the city of New Orleans, and after the year 1925, for the annual sinking fund necessary to call and retire the number of bonds provided for in section 9 of this act. After making, in each year, the provisions above required, and after deducting the expenses incurred by said board, and after paying any deficiency in the interest fund of any previous years, *one-half of the surplus* of said tax

shall be passed to the credit of a special fund, to be known as the '*permanent public improvement fund*,' to be disposed of as hereinafter provided; the other half of said surplus shall be paid over to the school board of the city of New Orleans, in addition to any fund appropriated by said city out of other funds, to be used in the maintenance and support of the public schools in said city."

"SECTION 10. That the permanent public improvement fund, above provided for, shall be used exclusively for the construction of permanent public improvements in the city of New Orleans, such as levees, *canals*, *drainage stations*, pavements, public buildings, public parks and bridges, and all ordinances passed by the city council to be paid out of this fund shall first be approved by the said Board of Liquidation, who shall not draw any checks on said fund unless they are convinced, upon proper inquiry, that said ordinance covers the construction of a permanent public improvement, within the purview of this act. The true intent and meaning of this clause is not to give said board any authority to say to what permanent public improvement any fund shall be applied, but only to see that said funds shall be applied exclusively to the construction of improvements that are permanent."

"SECTION 16. That all of the substantial provisions of this act are hereby declared to be a contract between the State of Louisiana, the city of New Orleans, the tax-payers of said city, and each and every holder of said constitutional bonds."

By the concluding portion of article 254 of the constitution of 1898 it is provided that one half of this surplus which goes to the public schools, shall not be disturbed, but that the schools shall still continue to receive the same, a provision which will be referred to again.

DRAINAGE COMMISSION OF NEW ORLEANS.

By act 114 of 1896 the Drainage Commission of New Orleans is established as a board or body politic, a large majority of its members consisting of city officials.

By the third section of that act the portion of the fund

in the hands of the Board of Liquidation, under the provisions of sections 8 and 10 of the act No. 110 of 1890, devoted to *permanent public improvements*, accruing to such works from and after January 1, 1898, is dedicated and applied to the purpose of *drainage* of the city of New Orleans, being one of the principal purposes catalogued in section 10 of the act of 1890.

By section 4 the commission is endowed with full power to control and execute the drainage of the city of New Orleans and to carry out substantially the plan for such drainage which had been adopted by the council of said city July 10, 1895.

By the sixth section, in order to do the work of drainage speedily and on an extensive scale, so as to benefit all parts of the city as soon as possible, the commission is authorized to issue bonds to an amount not exceeding $5,000,000, and all moneys and funds dedicated and applied by the act to the purpose thereof are consecrated to the payment of the principal and interest on said bonds.

By section 7, all the provisions of the act respecting the dedication and application of the funds and moneys are constituted a contract with the holder or holders of the bonds.

On June 21, 1897, in the case of The State *vs.* Flower, 49th Annual, 1199, the supreme court of Louisiana decided that the Drainage Commission was a lawful body, which the legislature had the power to create as an instrumentality for the drainage of the city, and on the faith of this decision contracts were made and bonds issued, as hereinafter set forth.

After this decision had been rendered and from about August, 1897, down to a time just prior to the adoption of the constitution of 1898—that is to say, May 12, 1898—on the faith of the act 114 of 1896 and the above decision of this court, the Drainage Commission entered into *contracts* to the amount of nearly $2,000,000, which are all set forth in the testimony and concerning which there is no dispute,

and of the work so contracted for a very large amount remains still to be done and paid for, which, as the testimony shows, must be paid for in cash from time to time as the installments are completed. The testimony also shows that no proceeds have yet been received by the Drainage Commission from the permanent public improvement fund under act 110 of 1890, but a certain amount is expected to be received during the year 1899. In order to speed the construction of the work, bonds were prepared and provided under act 114 of 1896, bearing date November 1, 1897, and of these $500,000 were sold at premium to *bona fide* purchasers in June, 1898. By act No. 63, approved July 9, 1898, the issue of bonds was limited to $1,500,000, and it was declared that all moneys and funds dedicated and applied for the purposes of drainage by the act 114 of 1896, as amended by act 63, were primarily consecrated to the payment of the interest on said bonds and the redemption of the principal, and that all of the provisions respecting the dedication and application of funds and moneys should constitute a contract, primarily, with the holder or holders of said bonds, and also with each and every person or corporation that might have entered into contracts with the said commission, and the obligation of said contract should not be impaired.

It appears without dispute that in 1897, when the bulk of the contracts were made, it was understood that drainage bonds would be thus issued and sold to meet the contracts. (See testimony of Walmsley, Mullan, and Freret, MS. transcript.)

We call especial attention to the foregoing dates, from which it will be seen that the contracts made by the commission antedate the adoption of the constitution of 1898; that when they were made it was understood that drainage bonds would be issued; that the bonds were prepared and dated November 1, 1897, and that the assumption by the city of New Orleans of the obligations of the school

oard, upon which this suit is instituted, *did not take place ntil July 26, 1898*—that is to say, long *after our contracts ere made and bonds issued and sold, and after the amending t of July 9, 1898, had been adopted by the legislature.*

It cannot be disputed, as a matter of fact, that all the unds consecrated by the drainage act 114 of 1896 are bsolutely necessary to meet the contracts made, as bove stated, and the principal and interest of bonds already ssued. The testimony of Mr. Walmsley on this point is lear and uncontradicted. It further appears as a matter of act that if the demands of the relators are allowed $115,000 f bonds will be issued under act 110 of 1890, on which the nnual interest charge will be $4,600. The surplus coming, herefore, to the permanent public improvement fund and edicated to drainage purposes would be reduced by at least he sum of $2,300 a year for not less than forty years. But nasmuch as under the operations of article 254 of the constitution of 1898, quoted above, the half of the surplus going o schools is specially protected, the whole of this impairment of $4,600 a year will fall upon the half of the surplus coming to the Drainage Commission. It will be seen at once, as a matter of mathematics, that this impairment might amount to $170,000 or more, and this in addition to claims of sinking fund.

The demand of the relators is based upon articles 315, 316, and 317 of the constitution of 1898, which took effect May 12, 1898. They claim that under article 317 the Board of Liquidation should be ordered to sell enough of the bonds prepared under the act of 1890 to pay their certificates, and the court of first instance so ordered. The affirmance by the supreme court of Louisiana, notwithstanding the theories of its opinions, leads to the same result.

The Board of Liquidation sets up various important defenses which have been discussed by its counsel and will be presented in its brief in this court.

The Drainage Commission of New Orleans intervened in

the case and joined the defense in resisting the demand of their relators. Its case was fully proved as a matter of fact. From the reasons given by the judge of the court of first instance it appears that it simply declined to declare the articles 315, 316, and 317 unconstitutional. It seemed to think also that the Drainage Commission had no legal interest in the premises, and therefore dismissed its intervention.

The Board of Liquidation and the Drainage Commission each took an appeal to the supreme court of Louisiana, and the Drainage Commission, following the line of its pleadings, filed an assignment of errors in accordance with Louisiana practice. The supreme court of Louisiana at first rendered a judgment of affirmance, but on application for rehearing modified it so as to recognize the right of the Drainage Commission to intervene; but, nevertheless, the judgment of the court of first instance was so far affirmed as to order the issue and sale of the bonds, as demanded by relators, and thus impair the fund of the Drainage Commission to the extent heretofore pointed out; thereupon the Drainage Commission, as well as the Board of Liquidation, took its writ of error to bring its case before this court. The transcript of record containing both writs of error and the respective assignments of error made therewith by both plaintiffs in error has been duly filed, but up to this date no portion of the transcript has been printed; and there being two writs of error, there are two cases appearing on the docket, that of the Board of Liquidation being numbered 369 and our proceeding being numbered 377.

For many details in regard to the questions involved, and especially in regard to the opinions rendered by the supreme court of Louisiana, we beg to refer to the brief of the learned counsel for the Board of Liquidation, Mr. B. K. Miller.

14174

ARGUMENT.

1.

The Drainage Commission of New Orleans had a plain and large interest and duty to intervene in this cause, and to protect a fund belonging to it, and to protect the contracts it has made with reference to such fund (State *vs.* Pilsbury, 31 Louisiana Annual, 1, 8).

In the first place, the surplus coming to the Drainage Commission from the operations of the act of 1890 belongs to it, and it has the same right to protect the fund that a private person has to protect his property from illegal seizure or conversion.

The fund is specially dedicated to an important purpose, and large contracts have been made and bonds issued upon the faith of this fund, and it is the duty of the Drainage Commission, in its fiduciary capacity and on plain general principles, to protect this fund from impairment, whether such impairment be great or small. In the case of Florida against Georgia, 17 Howard, 478, Mr. Caleb Cushing gave an excellent definition of intervention, which he saw was derived from the civil law, as follows:

"Intervention is the generic designation in the civil law of the various technical processes by which, when a suit is pending between two parties, a third party is allowed to interpose for the assertion of some collateral, implicit or ulterior right, adverse to that of either or both of the others, or to defend a responsibility involved in the issue of the controversy."

It was claimed in argument below that the drainage act of 1896 is unconstitutional, as a matter of State law, so far

as it undertakes to place the permanent public improvement fund under the administration of the Drainage Commission.

But the supreme court of Louisiana held the Drainage Commission entitled to intervene and protect this fund, and manifestly considered the drainage laws constitutional. We may refer, however, to State *vs.* Flower, 49 Louisiana Annual, 1199. This being a State question, we need not trouble this court by discussing it.

But, as Mr. T. J. Semmes, the late distinguished leader of our State bar, gave an opinion on this point, we pray leave to print it here as follows:

NEW ORLEANS, *Nov.* 15, 1898.

R. M. WALMSLEY, Esq.,
President Drainage Commission of New Orleans, City.

DEAR SIR: You have asked for my opinion upon the following question:

"Whether the General Assembly had the power by the act No. 114 of 1896, to turn over to the Drainage Commission of New Orleans the portion of the surplus funds devoted to permanent public improvements in the city of New Orleans, arising from the operation of act No. 110 of 1890, and the constitutional amendment of 1892."

Section 1 of act 110 of 1890 contemplates a surplus of the one per cent. tax, and declares that the same shall be disposed of "as prescribed by the legislature."

The act which is appended to the constitutional amendment proposed by act 110, and which is styled No. 36, by section 8 places one-half of the surplus of said tax to the credit of a special fund to be known as "a permanent public improvement fund," to be disposed of "as hereinafter provided," page 150.

The tenth section declares as follows:

"*Be it further enacted, etc.*, That the 'permanent public improvement fund,' above provided for, shall be used ex-

clusively for the construction of permanent public improvements in the city of New Orleans, such as levees, canals, drainage stations, pavements, public buildings, public parks and bridges, and all ordinances passed by the city council to be paid out of this fund, shall be first approved by the said board of liquidation, who shall not draw any check on said fund, unless they are convinced, upon proper inquiry, that said ordinance covers the construction of a permanent public improvement within the purview of this act. The true intent and meaning of this clause is not to give said board any authority to say to what permanent public improvement said fund shall be applied, but only to see that said funds shall be applied exclusively to the construction of improvements that are permanent."

It appears that drainage canals and drainage stations are especially recited by the legislature as permanent public improvements, and it will further be noticed that in 1895 the city of New Orleans had adopted a drainage plan by an ordinance of July 26, 1895.

By the fourth section of act 114 of 1896 the legislature adopts this plan, and directs the Drainage Commission of New Orleans to carry it out.

By the second section of act 114 the above-mentioned surplus accruing to the public works of that kind is dedicated and applied to the purposes of the act for carrying out this plan. By the sixth section of the same act, 114, the Drainage Commission, in order to do the work speedily and on the extensive plan, is authorized to issue and dispose of its negotiable bonds, and this section declares that all moneys and funds dedicated and applied by this act to the purposes thereof are consecrated to the payment of the principal and interest on said bonds; and by section 7 of same act the provisions respecting the dedication and application of funds and money are declared to constitute a contract with the holder or holders of said bonds.

By the act 63 of 1898 this issue of bonds by the Drainage Commission is limited to $1,500,000, and the provisions

of the act in regard to the dedication of funds are declared to be a contract not only with bondholders, but with all persons having contracts with the Drainage Commission.

In the case of State *vs.* Walter C. Flower and others, 49th Annual, 1199, the attorney general directly questioned the right of the Drainage Commission to exist, but the supreme court decided that the act was valid under the police power of the legislature to provide for the efficient drainage of New Orleans; and further held that article 253 of the constitution of 1879, securing to the citizens of New Orleans the right of appointment of certain officers, did not divest the State of the police power to protect the public health by the system of drainage set forth in the act.

It seems to me that the right of the legislature thus to dedicate the surplus fund in question to the work of drainage by act 114 of 1896 is beyond dispute. The provisions above quoted from the act 110 of 1890, by the operation of which the fund is created, whether they be looked upon as statutory or constitutional, offer no objection to this exercise of power by the General Assembly. By the first section of the act 110, as already quoted, the surplus is to be disposed of "as the legislature shall direct." By section 8 of the same act the half of this surplus fund is to be "passed to the credit of a permanent public improvement fund." By the tenth section it is to be devoted to the construction of permanent public improvements in the city of New Orleans, of which drainage stations and canals are given as examples. The Board of Liquidation is directed not to pay for any work which is not a permanent public improvement, and all ordinances which may be passed by the city to be paid out of this fund shall first be approved by the Board of Liquidation. But there is nothing in this language which could deprive the General Assembly of the political right to establish a Drainage Commission as composed in the act 114 of 1896, and direct it to use this fund for the permanent public improvement known as the drainage plan.

14196

Especially must this be true when it is seen that the drainage plan adopted by the act 114 of 1896 is the same plan of permanent public improvement devised at the suggestion of the council, adopted by it in July, 1895, and manifestly payable out of that fund.

Courts have never looked with favor upon any attempt to fetter the power of the General Assembly in dealing with municipal corporations as to matters which are public and political. Under the constitution of 1879 the General Assembly had special authority given to it, by excess of caution, to abolish the city government and remit the inhabitants to a new form of government. The recognition, by section 10 of the act 110 of 1890, of the fact that the common council for the time being would pass ordinances in respect to this permanent public improvement fund could not prevent the legislature from adopting the city's plan and establishing a commission to carry it out, and giving to that commission the administration of the fund. (Police Jury *vs.* Shreveport, 5th Annual, 661; People *vs.* Hurlbut, 24 Mich., 44; Pennie *vs.* Reis, 132 U. S., 465; E. Hartford Bridge Co. *vs.* Hubbard, 10 Howard, 533, 534).

The right "vested" by the act of 1890 was vested in a "permanent public improvement fund" (Fisher *vs.* Board, 48th Annual, at page 1079). But the right is not vested in any particular person or political body, and the legislature at any time could create a new body to administer the fund for permanent public improvements (49th Annual, 1199).

Very truly yours,

(Signed) T. J. Semmes.

II.

It appears by the testimony and as a matter of calculation that by the execution of articles 315, 316, and 317 of the constitution of 1898, as proposed by the relators and by the State court, the surplus coming to the permanent public

improvement fund will be impaired by at least $180,000—say, $4,600 a year for some forty years. This impairment is a very serious one, especially as the testimony shows that every cent of the permanent public improvement fund is needed to carry out the contracts made by the Drainage Commission prior to May 12, 1898, and to pay the drainage bonds which were issued and sold before the city assumed the claims of the relators. We repeat that the Drainage Commission had made contracts amounting to nearly $2,000,000 and had issued and sold bonds to pay such contracts to the amount of $500,000 before the city became indebted to relators.

It may be added also that the amount of impairment is not essential. The Constitution of the United States does not declare that a State "shall not pass any law impairing the obligation of contracts to a very great extent." The prohibition is against the impairing of such obligations at all. In Planters' Bank against Sharp, 6th How., page 327, the court said:

"One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

In Louisiana against New Orleans, 102 U. S., at page 206, it was said:

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced; by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation."

III.

It results that the articles 315, 316, and 317, and especially 317, as sought to be enforced in this case, are unconstitutional for the reasons given in the intervention. The means provided to meet the contracts of the Drainage Commission consist of that permanent public improvement fund in a very large measure. There is no dispute as to the fact that every cent is required to carry out this most important work, and to fulfill the obligations of these contracts, which must be paid promptly or the whole plan will fall into a state of chaos. To enforce article 317, as proposed in this case by the relators, would not only impair obligations issued by the Board of Liquidation, whose rights will be defended by its counsel, but will impair the obligation of the contracts made by the Drainage Commission and the bonds issued by it. These contracts were made prior to the constitution of 1898 and with the distinct understanding that the bonds prepared and dated November 1, 1897, would be sold to meet them. The contracts were also made and the bonds sold to *bona fide* purchasers prior to the assumption by the city of relators' claim. That assumption was on July 26, 1898, and prior to that date *the city owed the relators nothing*. Under articles 315, 316, and 317 the relators' claims in this case, therefore, date only from July 26, 1898. Articles 315, 316, and 317 are, therefore, invalid:

(*a*.) Under the contract clause of the Constitution of the United States, article 1, section 10.

(*b*.) Under the fourteenth amendment of the United States Constitution, because they undertake, as shown in this case, to deprive a person of property without due process of law. The person to whom we refer is the Drainage Commission

of New Orleans, which is a juridical person, and included in the terms of the fourteenth amendment by repeated decisions, it having often been held that the fourteenth amendment protects legal persons as well as natural persons (Santa Clara Co. *vs.* So. Pac. R. R. Co., 118 U. S., 394).

The régime established by the articles 315, 316, and 317 seeks to break up and impair the whole plan of the act 110 of 1890 and the constitutional amendment of 1892, and it ought not to be enforced. The fact that this attempt is made under a State constitution makes no difference.

Cole *vs.* La Chambre, 31 La. Ann., at page 45.
White *vs.* Hart, 13 Wallace, 646

Our writ of error is therefore justified.

IV.

Great reliance has been placed by the relators upon language used in the case of The Board of Liquidation against McComb, 92 U. S., page 531; but, rightly considered, the decision in the case of McComb is very much in point in favor of the plaintiff in error is this case. McComb, a citizen of Delaware, filed his bill in the United States circuit court in New Orleans, as a holder of consolidated bonds under the act No. 3 of 1874, to enjoin the Board of Liquidation appointed under that act, which was about to violate its limitations. He obtained an injunction in the circuit court, and on appeal to the Supreme Court of the United States the decree was affirmed; thus declaring that even State officers composing a board of liquidation may be enjoined from violating the limitations of the funding act of 1874. Such a result seems to us to be in our favor in this controversy. The final result which we seek to obtain is tantamount to that which was attained by McComb.

The following differences may be noted between the two cases:

(*a.*) The Board of Liquidation in the case of McComb was willing to illegally fund the debt of the levee company.

(*b.*) The debt of the levee company was in existence prior to the funding act of 1874, whereas the city of New Orleans in the case at bar owed the relators nothing on the 12th of May, 1898, under articles 315, 316, and 317, when the constitution went in force.

(*c.*) There was no question in the McComb case of a *surplus* resulting from a special tax and dedicated to a public improvement fund, to be administered for purposes quite distinct from the issue of constitutional bonds and by agencies quite distinct. Under the funding act No. 3 of 1874 any surplus was used simply to pay the new bonds, and there was no question of the right of a permanent public improvement fund to a surplus which would be greater if the issue of bonds was confined to its legitimate purpose and which would be diminished if the issue of bonds should be unlawfully increased. This is a very important difference and does away with all effect of any expressions in the opinion of Mr. Justice BRADLEY which have been cited against us in this case. The right to such a surplus and to its preservation was not agitated in the case of McComb at all. If there had been such a surplus, coming to some third person, and devoted to some other object, by the funding act of 1874, it cannot be doubted that this court would have considered the impairment of that surplus as another reason for affirming the decree in favor of McComb.

(*d.*) But it may also be specially noted that while Mr. Justice BRADLEY discussed the question whether McComb could complain of an issue of bonds provided it did not

exceed the limit of $15,000,000, neither he nor the court reached any real decision of the question. What the learned judge said was, at page 539, that if this were all the case, the complainant would have "great difficulty" in maintaining his bill. This was not decision. It was not necessary to the disposition of the case, and no decision was really made in regard to it, because it was found that there was another point upon which the decree should be affirmed, and that was that the Board of Liquidation in that case was proceeding in a method not justified by the limitations of the funding act. This is distinctly in our favor.

We ask that the motion be denied.

Respectfully submitted.

WILLIAM WIRT HOWE,
For the Drainage Commission of New Orleans, Plaintiff in Error.

OCTOBER 30, 1899.